

OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

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MINUTES FROM THE ADVISORY COMMITTEE MEETING

Employer Duty to Pay for Personal Safety Devices and Safeguards

March 22, 2012

2211 Park Towne Circle, Suite 5, Sacramento, California

The advisory committee convened at 9:30 a.m. on March 22, 2012 at 2211 Park Towne Circle, Suite 5, Sacramento California. Present in order to conduct the meeting were Occupational Safety and Health Standards Board (Standards Board) Principal Safety Engineer Mike Manieri, Industrial Relations Counsel III David Beales and Associate Government Program Analyst Leslie Matsuoka. Also present were Standards Board Executive Officer Marley Hart, Division of Occupational Safety and Health (Division) Deputy Chief Deborah Gold, Division Special Counsel Suzanne Marria, Division Principal Safety Engineer Pat Bell and Federal OSHA Area Director David Shiraishi. Other attendees' names and affiliations are on the advisory committee attendance roster.

Mr. Manieri opened the meeting, explaining, among other things, the role of consensus at advisory committees. He said words to the effect that consensus has been helpful in shaping Standards Board rulemakings and that consensus means more than a mere majority, but does not demand unanimity. Jeremy Smith (labor) stated that there is no Labor Code consensus requirement.

Mr. Beales summarized the history of the rulemaking, noting that, a few months ago, the Standards Board rejected a rulemaking proposal regarding the employer's duty to pay for required personal protective equipment (ppe) and urged that this advisory committee be convened. Mr. Beales introduced the legal authority provided to the committee members, drawing particular attention to the Federal Register excerpt that contained a 2007 Federal OSHA rulemaking and a 2011 Occupational Safety and Health Appeals Board decision that followed the long-standing and continuing principle of California law to the effect that employers must pay for required ppe. He also presented the current Board Staff proposal, stating that the proposal strives to follow Standards Board Member Willie Washington's suggestion that the proposal focus on guidance rather than a list of exceptions.

The committee then considered the necessity of the current proposal. Mr. Beales offered two possible bases for necessity: (1) Federal OSHA's insistence that California adopt a general duty-to-pay regulation and (2) the clarity that such a regulation would provide by removing the duty

from the camouflage of case law. Mitch Seaman (labor) said that case law regarding the employers' duty to pay is clear and that provisions mirroring the federal exceptions only add disputatious ambiguity. Ms. Marria said that the only part of the proposal that is needed is the first sentence, the proposal's only affirmative, explanatory sentence. Ms. Gold said that the portions of the proposal tracking the Federal exceptions were at odds with duty-to-pay requirements in other State regulations, such as the blood borne pathogen standard.

Michael Marsh (labor) anticipated a court challenge of any regulation on the basis of the Office of Administrative Law/Administrative Procedure Act "necessity" requirement, in that duty-to-pay case law is so clear that there is no need for regulatory amplification. Mr. Beales responded that the adoption of a regulation, as opposed to leaving the duty solely in case law, would impact the Division's citation authority. Rob Roy (management) said that Federal OSHA's insistence on the adoption of a State regulation might constitute some sort of legal necessity. John Bobis (management) said that the Standards Board lacks the legal authority to adopt a duty-to-pay regulation. Mr. Beales said that the Labor Code's requirement that California have standards at least as effective as the Federal OSHA standards constituted such legal authority and that, since Federal OSHA has duty-to-pay standards, the Standards Board may adopt such a standard as well.

Ms. Marria and Mr. Beales discussed the meaning of "standard." She relied on Labor Code Section 6407 for the proposition that "standard," as used in the Labor Code, means something other than a Title 8, Standards-Board-adopted regulation. Mr. Beales stated that, per Labor Code Section 142.3(a)(1), "occupational safety and health standards" are provisions adopted by the Standards Board. He also said words to the effect that the Division cites employers for violations of Standards-Board-adopted Title 8 provisions and not for violations of case law.

Fran Schreiber (labor) agreed with Ms. Marria and added that the Bendix-based meaning of "provide" renders California's Title 8 provisions at least as effective as their federal counterparts. She said that if the Standards Board either did no rulemaking on this topic or adopted as a regulation the first sentence of the current proposal, there would be no lawsuit challenging the Board's action.

Kevin Bland (management) said that either the status quo should be maintained (i.e., no new duty-to-pay regulation should be adopted by the Standards Board), or the entire proposal, including the Federal-exception-based provisions, should be considered.

Mr. Beales drew the committee's attention to the written comment of the California Chamber of Commerce to the effect that the word "specifically" should be added to the proposal's first sentence. Michael Marsh (labor) and Bruce Wick (management) asked whether Title 8, Section 3380 already states the employer's duty to pay. Mr. Manieri said that the portion of Section 3380 in question dealt with the selection of ppe and that selection is separate from payment.

Ms. Marria said that the addition of the word “specifically” to the first sentence would invite litigation. Mr. Wick said that regulations should provide guidance to the “foreman on the ground” and that the status quo (no general employer-duty-to-pay regulation) has worked, at least in the construction industry and that, since 1979, most employers have paid for ppe. Ms. Schreiberberg stated that the present common-sense approach has worked.

Terry Thedell (management) said that he likes the proposal’s use of the word “provide.” Eddie Bernacchi (management) mentioned the difficulty that employers with high-turnover unionized workforces would have providing ppe. Ms. Schreiberberg and Mr. Smith said that collective bargaining agreements addressed this concern, and Mr. Beales said that, because of the parameters of the Federal exceptions, no California standard expressly could create an exception for employers with high-turnover workforces. Chris Walker (management) said words to the effect that the adoption of a duty-to-pay regulation would make things harder for employers with collective bargaining agreements, since the regulation would circumscribe the possible scope of such agreements.

Ms. Schreiberberg said that perhaps it makes sense to leave things as they are. Cassie Hikaski (management) said that even one sentence opens a can of worms. Alan Davis (an attorney with some labor clients) indicated that the proposal’s first sentence might not be in harmony with Labor Code Section 6401 and that, unless the first sentence is really necessary, it might be better to do nothing.

Mr. Bland said that either all aspects of the issue should be considered, or the status quo should be maintained. Ms. Marria said that, in light of further consideration, the Division does not even urge the adoption of the proposal’s first sentence, as the sentence might conflict with the Division’s “special order” authority. Mr. Wick said that the present system works pretty well and that most people understand it.

Mr. Roy brought up issues that agricultural employers might have with the possible duty to pay for such things as rain gear. Mr. Marsh and Mr. Roy indicated that such disputes currently are generally worked out, and Mr. Marsh said words to the effect that the present system works. After a short break, the following management representatives voiced support for the status quo: Mr. Roy, Larry Pena, Mr. Bland, Mr. Bobis, Bill Taylor, Kate Smiley, Cindy Sato and Gerald Swanson.

Mr. Beales then stated that the committee’s clear consensus was that no rulemaking proposal should go forward. He asked whether anyone disagreed with that statement. No one did, and the meeting adjourned.